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Supreme Court, U.S.
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No. 01-1665

IN THE

Supreme Court of the United States

ALFRED M. COHEN,
EXECUTOR OF THE ESTATE OF SAMUEL GINSBURG,

Petitioner,

v.

UBS PAINEWEBBER INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

What is the appropriate standard for reviewing a district court's ruling that a party is indispensable under Rule 19(b) of the Federal Rules of Civil Procedure?

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STATEMENT

On August 11, 1992, Samuel Ginsburg entered into a "Client's Agreement" with PaineWebber, under which Ginsburg agreed to arbitrate any and all disputes between him and PaineWebber. Among other things, the detailed arbitration provision stated:

> I agree, and by carrying an account for me PaineWebber agrees, that any and all controversies which may arise between me and PaineWebber concerning any account, transaction, dispute or the construction, performance, or breach of this or any other agreement, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration. Any arbitration under this agreement shall be held under and pursuant to and be governed by the Federal Arbitration Act . . . .

Pet. App. 33a-34a.

Ginsburg and PaineWebber subsequently executed a "Master Account Agreement" that contains a second arbitration agreement. The second arbitration clause is nearly identical to the first, except that it not only references disputes between Ginsburg and PaineWebber but also specifies that it governs disputes between Ginsburg and "[PaineWebber's] employees or agents." *Id.* at 36a.

On October 9, 1999, Ginsburg died. Soon thereafter, Alfred Cohen, an Ohio resident, was appointed the executor of Ginsburg's estate. *Id.* at 37a.

On July 26, 2000, Cohen filed a civil action in state court against PaineWebber and one of PaineWebber's managers, Richard Wilhelm, seeking damages for alleged wrongdoing by a former broker of PaineWebber, Richard Zenni. In the complaint, Cohen claimed that PaineWebber and Wilhelm committed two torts, unlawful conversion and fraudulent concealment, and sought compensatory and punitive damages. *Id.* at 37a-38a. Because Cohen's action violated not just one,

but two, plainly-worded arbitration agreements, PaineWebber immediately sought to halt the state-court litigation. Accordingly, just two days later, on July 28, 2000, PaineWebber filed a diversity action in federal district court, seeking to compel Cohen to arbitrate the claims under the Federal Arbitration Act. *Id.* at 38a. PaineWebber also filed a motion in state court seeking to stay the action there pending a ruling by the district court on PaineWebber's petition. *Id.* Because the parties ultimately agreed not to proceed with the state court action while the federal petition was pending, the state court did not rule on the motion and with one minor exception no further proceedings occurred in the state court until after the district court ruled on PaineWebber's action.

On January 31, 2001, the district court (Weber, J.) granted Cohen's motion to dismiss PaineWebber's petition for lack of subject matter jurisdiction. Applying Rule 19 of the Federal Rules of Civil Procedure, the district court determined that Wilhelm was a necessary and indispensable party to PaineWebber's petition to compel arbitration. Because Ginsburg was a resident of Ohio, because Cohen is treated as a citizen of the same state as Ginsburg under 28 U.S.C. § 1332(c), and because Wilhelm is a resident of Ohio, the court as an initial matter determined that the presence of Wilhelm in the case would defeat complete diversity. And even though Wilhelm was an agent of PaineWebber, the district court concluded that the continuation of the litigation in state and federal court "would likely subject parties to inconsistent legal obligations," Pet. App. 49a, and at all events it believed that "[t]he state court can give arbitration agreements full effect." *Id.* at 50a. The district court therefore dismissed the arbitration petition.

The Sixth Circuit (Boggs, J., *Gilman*, J., Bright, J.) reversed. It first determined that the district court did not abuse its discretion in concluding that Wilhelm was a necessary party under Rule 19(a). Pet. App. at 9a. Applying *de novo* review to the district court's Rule 19(b) analysis,

however, the court of appeals concluded that Wilhelm was not an indispensable party requiring the dismissal of the federal-court action. *Id.* at 19a.

With respect to the first Rule 19(b) factor—the risk of prejudice to the parties to the federal case—the court rejected Cohen's argument that the continuation of the federal case would subject him to repetitious and piecemeal litigation. The "possibility of having to proceed simultaneously in both state and federal court," the Sixth Circuit concluded, "is a direct result of Cohen's decision to file a suit naming PaineWebber and Wilhelm in state court rather than to demand arbitration under the Master Account Agreement." Pet. App. 11a. Moreover, "the possibility of piecemeal litigation is a necessary and inevitable consequence of the FAA's policy that strongly favors arbitration." *Id.* at 12a. *See id.* (risk of litigation in two forums "'occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement'") (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983)). Rather, the court concluded, "Cohen's real goal appears to be the avoidance of arbitration on any portion of his dispute," which does not suffice to defeat a party's attempt to do what the FAA permits—namely, enforce the arbitration agreement in federal court. Pet. App. 14a.

Nor in the court's view did the second Rule 19(b) factor—the extent to which any prejudice may be reduced "by protective provisions in the judgment"—favor a determination of indispensability. The "small degree of potential prejudice" to Cohen, the court reasoned, makes this factor "less important." Pet. App. 17a.

The court next concluded that a judgment rendered in Wilhelm's absence "will be adequate," consistent with the third inquiry under Rule 19(b). *Id.* "Having to submit claims to arbitration," the court held, "does not raise concerns about the adequacy of a judgment." *Id. See id.* ("the FAA creates 'a

liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary'") (quoting *Moses H. Cone*, 460 U.S. at 24-25).

The court concluded that the fourth factor—whether the plaintiff will have an adequate remedy if the action is dismissed—favors dismissal because Cohen could bring his claims against PaineWebber and Wilhelm in state court. Pet. App. 18a. But in the court's view "the potential existence of another forum does not, in and of itself, outweigh a plaintiff's right to the forum of his or her choice." *Id.* (quotation omitted).

Lastly, the court reasoned that one other consideration "weighs against the conclusion that Wilhelm is an indispensable party." *Id.* "Any ruling to the contrary," the court observed, "would virtually eliminate the availability of federal courts to enforce arbitration clauses in diversity cases by the simple expedient of one of the parties filing a preemptive suit in state court with at least one non-diverse defendant." *Id.* The court therefore reversed the district court's decision to dismiss the federal case.

Judge Bright dissented. He primarily took issue with the majority's conclusion that the "risk of piecemeal litigation resulting from parallel proceedings is a necessary and inevitable consequence of the FAA's policy favoring arbitration." Pet. App. 27a (quotation omitted).

REASONS FOR DENYING THE WRIT

There are at least five reasons why the Court should deny the petition. First, contrary to petitioner's suggestion, the Sixth Circuit's decision does not conflict with any decisions of this Court. Second, petitioner does not deliver on his claim that there is a pertinent lower-court conflict of authority. The cited cases either are inapposite or fail to show that the Sixth Circuit's analysis would have led to a different result had it been embraced in any of these other courts of appeal. Third,

even petitioner does not separately argue that the question is sufficiently important in its own right to warrant review. Fourth, the decision below is correct on the merits. Fifth, the case presents a poor vehicle for reviewing the issue—among other reasons because it arises in the context of the enforcement of an arbitration agreement (unlike all of the cited lower-court cases) and because the ongoing relevance of this dispute could be affected by a pending petition filed on August 13, 2002 that concerns the same parties that are involved in this dispute. For these reasons and those elaborated below, the petition should be denied.

I. The Sixth Circuit's Decision Does Not Conflict With Any Decisions Of This Court.

Petitioner initially argues (Pet. 6) that "[t]his Court . . . has determined abuse of discretion is the appropriate standard of review" for considering the propriety of a district court's determination that a party is indispensable under Rule 19(b). That is wrong.

Petitioner cites just one case, *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), in support of this proposition, and the case says no such thing. At issue in *Provident Tradesmens Bank* was a "challenge to the scope of the newly amended Rule 19," *id.* at 107, not a challenge to the standard of review governing Rule 19 appeals. Indeed, *Provident Tradesmens Bank* had no opportunity to pass on the standard-of-review question because the Rule 19 issue "emerged for the first time in the Court of Appeals." *Id.* at 109. As the Court acknowledged, "[e]ach of these interests [enumerated in Rule 19(b)] must, in this case, be viewed entirely from an appellate perspective since the matter of joinder was not considered in the trial court." *Id.* Even if the Court had wished to discuss the standard for reviewing trial-level Rule 19(b) decisions, in other words, it had no opportunity to do so in *Provident Tradesmens Bank*. This claimed conflict of authority, in short, is a mirage.

II. Petitioner Has Not Established A Meaningful Lower-Court Conflict Of Authority.

Petitioner next claims (Pet. 7) that "[a] conflict among the circuits exists regarding the appropriate standard of review to apply when considering whether a party is . . . indispensable" under Rule 19(b). This argument, too, overstates the case.

A. The Principal Lower-Court Decisions Upon Which Petitioner Relies Do Not Establish Such A Conflict.

In trying to establish a lower-court conflict, petitioner primarily argues (Pet. 6-8) that the Ninth, Tenth and Fourth Circuits have held that an abuse-of-discretion standard applies to Rule 19(b) decisions. But the cited cases do not sustain this initial contention.

As to the Ninth Circuit, the only cited case involves Rule 19(a). Contrary to petitioner's suggestion, the court in that case did not (and indeed had no opportunity to) issue any holding regarding the standard of review under Rule 19(b). *See Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999) (concluding that entity was not a necessary party under Rule 19(a)).

As to the Tenth Circuit, the only cited case contains *dictum* supporting petitioner, but nothing else. In *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999), the court to be sure said that "[t]his court reviews Rule 19 determinations under an abuse of discretion standard." *Id.* at 957. But in the decision itself, the court remanded the Rule 19(b) inquiry to the district court for a decision in the first instance. In the court's words: "[T]his court declines to undertake the Rule 19(b) analysis in the first instance and remands to the district court to conduct an analysis of all the factors articulated in Rule 19(b) and make a reviewable determination as to whether the Tribe is an indispensable party." *Id.* at 961. In addition, the court acknowledged that the "[u]nderlying legal conclusions supporting Rule 19 determinations . . . are reviewed *de novo*."

Id. at 957. Of course, that view (whether *dictum* or not) wholly accords with the Sixth Circuit's position on the issue.

As to the Fourth Circuit, the cited case does purport to apply an abuse-of-discretion standard to a Rule 19(b) determination. *See Nat'l Union Fire Ins. Co. of Pittsburgh v. Rite Aid*, 210 F.3d 246 (4th Cir. 2000). But that standard of review was hardly material to the outcome of the case because the court of appeals acknowledged that "all four [Rule 19(b)] factors" supported the trial court's decision. *Id.* at 254. Accordingly, the decision by no means supports the material point that needs to be made here—namely, that two courts of appeals (here the Fourth and Sixth Circuits) are saying *and* doing different things when it comes to the amount of deference owed to trial court Rule 19(b) dismissals. The Fourth Circuit's decision in *Rite Aid* establishes no such conflict.

B. The Second Tier Of Cases Upon Which Petitioner Relies Does Not Establish The Requisite Conflict.

Petitioner does no better in arguing (Pet. 8-9) that six other circuits—specifically, the First, Second, Fifth, Eighth, Eleventh and D.C. Circuits—have embraced an abuse-of-discretion standard. The cited cases, again, do not support this broad claim.

In *Tell v. Trustees of Dartmouth College*, 145 F.3d 417 (1st Cir. 1998), the First Circuit acknowledged that there "is apparently some difference among the circuits as to [the] standard of review of decisions as to necessary joinder under Rule 19(a)," *id.* at 418, but did not reach a similar conclusion with respect to Rule 19(b). As to its review of the underlying trial court decision, it concluded that "the outcome would be the same even if we decided the application issues afresh," *id.* at 419, which is to say the standard of review made no difference in the ultimate disposition of that case. (An earlier First Circuit case, relied upon by petitioner to support its merits argument (Pet. 12), *see The Travelers Indemnity Co. v.*

Dingwell, 884 F.2d 629, 635 (1st Cir. 1999), does appear to establish a conflict with the Sixth Circuit on the Rule 19(b) question. But the detail of the First Circuit's analysis makes it less than apparent how that court's Rule 19(b) standard of review differs from the Sixth Circuit's standard of review.)

In *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998), the Second Circuit acknowledged that a Rule 19(b) dismissal is reviewed "under the abuse of discretion standard." *Id.* at 161. But that discretionary language hardly squares with what the court did in the case, which was to reverse the trial court's dismissal and remand the case "to reconsider the dismissal on Rule 19 grounds." *Id.* at 162. In other words, *de novo* review necessarily would have produced the same outcome.

In *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305 (5th Cir. 1986), the Fifth Circuit said that "a district court's decision to dismiss for failure to join an indispensable party [under Rule 19(b)] is properly reviewed under an abuse-of-discretion standard." *Id.* at 1309. And in reviewing the trial court's Rule 19(b) dismissal, the Fifth Circuit in fact affirmed the lower-court's dismissal, concluding that "the district court did not abuse its discretion." *Id.* at 1313. All of this would suggest a difference of opinion between the Fifth Circuit and Sixth Circuit on the standard for reviewing Rule 19(b) dismissals, save for one point. A review of the Fifth Circuit's opinion hardly reassures the reader that the court was in fact applying a deferential standard. As the court acknowledged, it affirmed only "after a full consideration of all the factors enumerated in Rule 19," *id.*, and the depth of its analysis of those factors is exceedingly difficult to distinguish from the *de novo* review given by the Sixth Circuit in this case.

In *United States ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249 (8th Cir. 1998), the Eighth Circuit also said that it reviewed district court dismissals "under Rule 19(b) for an abuse of discretion." *Id.* at 1251. But that standard of review did not change the outcome in the case because the court

ultimately reversed the lower court dismissal. More, the contents of the appellate court's analysis again bear more similarity to *de novo* review than to abuse-of-discretion review. *See id.* ("After reviewing the record, we conclude that the district court erred by finding that the Tribe would be prejudiced if this action continues in its absence.").

In *Torcise v. Community Bank of Homestead*, 116 F.3d 860 (11th Cir. 1997), the Eleventh Circuit affirmed a district court (and, before that, a bankruptcy court) decision concluding that an entity was not a necessary party under Rule 19(a). While the court purported to apply an abuse-of-discretion standard, that has no bearing on the appropriate standard for Rule 19(b) dismissals.

In *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995), the D.C. Circuit said that it reviewed a "district court's determination that Kansas was not an indispensable party under Rule 19(b) for abuse of discretion." *Id.* at 1495. But it nonetheless proceeded to reverse the district court's decision, proving that the outcome of the case was not affected by the court's application of the less stringent standard of review. *Id. See also id.* at 1497 ("Thus, notwithstanding the discretion generally accorded to the district court to consider which factors to weigh and how heavily to emphasize certain considerations, the district court was confronted with a more circumscribed inquiry when it assessed whether the Tribe's lawsuit could proceed.") (quotation omitted).

In the last analysis, these cases do not establish the deep conflict of authority that petitioner advertises. Some are merely Rule 19(a) cases. Others involve only *dicta*. Still others fail to demonstrate that the standard of review made any difference in the outcome of the case. And all of the cases, even the Fifth Circuit's decision in *Pulitzer* and the First Circuit's decision in *Travelers*, appear to have been situations in which the parties themselves did not even debate the appropriate standard of review. Under these circumstances,

the conflict is at best shallow and at worst non-existent. The issue warrants further percolation in the lower courts.

C. Any Conflict Of Authority Concerning The Rule 19(a) Standard Of Review Is Immaterial.

Presumably trying to shore up its efforts to establish a conflict in the lower courts regarding Rule 19(b), petitioner next argues (Pet. 8-11) that a conflict exists with respect to the appropriate standard of review for Rule 19(a) trial court decisions. But even if such a conflict exists, it would not support the petition. In this case, the district court and the Sixth Circuit both agreed with petitioner that Richard Wilhelm was a necessary party under Rule 19(a). Petitioner is in no position to seek review of an issue upon which he prevailed below. The Rule 19(a) cases, in short, have no bearing on this case.

III. Petitioner Does Not Separately Argue That The Issue Is Sufficiently Important To Warrant Review.

At no point does petitioner independently argue that this federal question is of sufficient magnitude otherwise to deserve review. In view of the inapposite cases upon which petitioner relies, or the *dicta*-infused nature of many of those decisions, this is precisely the kind of issue that will benefit from further percolation in the lower courts and that is exceedingly unlikely to generate any litigation crises in the interim. The closest petitioner comes to arguing to the contrary is to say (Pet. 9) that the alleged lower-court variations affect "the faith of the public in the judicial system." But if this modest issue affects the public's faith in the judiciary, then it would seem that every federal question does so as well. The argument thus not only paints too fragile a picture of the public's trust in the courts but also does not provide a meaningful ground for distinguishing this petition from virtually every other one.

IV. The Sixth Circuit's Decision Is Correct On The Merits.

After repeating (Pet. 11) the erroneous conclusion that *Provident Tradesmens Bank* has already resolved this issue, petitioner devotes (Pet. 12-13) two paragraphs to arguing the merits of the case. The response deserves even less space.

The short answer, as the Sixth Circuit recognized, is that the relevant issues related to whether a court should take the extraordinary step of dismissing a case for failure to join a critical party have more in common with the traditional work of appellate judges than the traditional work of trial judges. By their terms, the Rule 19(b) questions demand legal, not factual, answers. Will for example the "plaintiff have an adequate remedy if the action is dismissed for nonjoinder"? *See* Rule 19(b). Or will a "judgment rendered in the person's absence . . . be adequate"? *Id.* Both inquiries require legal, not factual, assessments of the available remedies at law to an interested party. And while the two other Rule 19(b) questions have a factual ring to them—will a judgment "prejudice" the absent party and may that prejudice "be lessened or avoided"?—the inquiry in each instance is in the end again a legal one. Any potential prejudice to a potential party stems not from run-of-the-mill factual inquiries about the parties but from the legal effect a judgment entered in one case will have on a potential dispute in another case.

V. This Case Presents A Poor Vehicle For Reviewing The Issue.

But even if all of this were not true—in other words, even if there were a material conflict of authority or even if the Sixth Circuit had decided the question incorrectly—this case presents a weak vehicle for considering the issue. For one, petitioner did not even raise (or preserve) the standard-of-review issue in his merits briefs to the Sixth Circuit. Not until petitioner's rehearing and *en banc* petition did he first raise the

question. That is why the Sixth Circuit did not analyze the question in any detail and that is why the issue presumably has been waived here.

For another, this case arises in the unique setting of the enforceability of an arbitration agreement under the Federal Arbitration Act. In view of the long-established position that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), it would seem to make little sense to issue a decision about the Rule 19(b) standard of review when that determination here could well be affected by the federal courts' presumption in favor of arbitration. Confirming the point, not one of the lower-court cases upon which petitioner relies involves the enforcement of an arbitration agreement. And in point of fact, the federal appellate courts that have considered the specific Rule 19 question presented below—whether an employee is an indispensable party to a federal arbitration petition filed by his or her employer—have uniformly rejected that notion, just as the Sixth Circuit did. *See Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 445 (2d Cir. 1995); *Snap-On Tools Corp. v. Mason*, 18 F.3d 1261, 1267 (5th Cir. 1994); *NCR Corp. v. Hayes Children Leasing Co.*, No. 94-16996, 1995 WL 433916, at *4 n.1 (9th Cir. July 24, 1995); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 946 (11th Cir. 1999).

For still another reason, this case hardly presents an efficient setting for reviewing the issue. As noted, the Rule 19(a) standard of review, which petitioner also claims is in disarray, is not properly presented in this case since petitioner prevailed on the issue below. In addition, the standard-of-review question would almost certainly arise in other cases asking substantive questions about how Rule 19 should be interpreted substantively. Better, it would seem, to review the question either when the Court is asked to resolve a conflict about the meaning of the Rule itself or when at a minimum it

is legitimately called upon to announce the standard of review for Rule 19(a) and Rule 19(b) determinations.

For a final reason, this case does not stand alone. As noted, there is a parallel state-court proceeding in which respondents have argued that the underlying arbitration agreement must be enforced. Thus far, the state courts have rejected that contention. On August 13, 2002, however, respondent filed a petition for a writ of certiorari with this Court regarding that state-court determination. In view of the pendency of that petition, involving essentially the same parties and concerning the same arbitration agreement, it would be a mistake to grant this petition before the Court determines the proper resolution of the state-court certiorari petition. A final resolution of the state-court proceeding could well affect the ongoing relevance of this federal-court action.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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